No. 94-1719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION
Petitioner,

-v.-

VISA U.S.A. INC.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CENTER FOR PUBLIC INTEREST RESEARCH, THE ORGANIZATION FOR CONSUMER JUSTICE, AND THE EMPIRE STATE CONSUMER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of this Court, *amici* respectfully move for leave to file the attached Brief of *Amici Curiae* in Support of the Petition for Writ of Certiorari. Petitioner MountainWest Financial Corporation has consented to the filing of the brief. This motion is necessary because Respondent VISA U.S.A. Inc. has denied consent.

The *amici*, non-profit organizations whose goals include advocacy on behalf of American consumers, share a concern regarding competition in the market for general purpose charge cards, a modern financial tool carried by millions of Americans. *Amici* have a substantial interest in the level and scope of competition in this market--a market that (1) has witnessed no new proprietary card issuers since the imposition of Visa's Bylaw 2.06, the focus of this lawsuit, and (2) would experience an increase in competition to the benefit of consumers were the jury's finding that Bylaw 2.06 violates the antitrust laws reinstated and Visa membership extended to Petitioner.

The Center for Public Interest Research ("CPIR") is a non-profit statewide consumer research and advocacy organization in Lansing, Michigan. Since 1979, CPIR has worked on behalf of consumers in the areas of insurance, banking, utilities, and the environment. CPIR is a member of the Consumer Federation of America, a non-profit organization that represents the interests of over 50 million American consumers.

The Organization for Consumer Justice ("OCJ") was established in 1975 as a non-profit consumer education organization. OCJ has over 300 members and is a member of the Consumer Federation of America. OCJ is headquartered in Hagerstown, Maryland.

The Empire State Consumer Association ("ESCA"), with offices in Rochester, New York, is a non-profit consumer advocacy organization. ESCA was established in 1974. It is also a member of the Consumer Federation of America.

This case is of great interest to *amici* because the decision of the United States Court of Appeals for the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) poses a serious threat to consumers. *Amici* wish to focus this Court's attention in particular on a fundamental flaw underlying the Tenth Circuit's economic and antitrust analysis: the erroneous notion that, with 6,000 competitors already in the Visa joint venture and competing with each other on price, one more can't "make a difference." In fact, substantial competitive injury to consumers can--and in this case will--result from collective action denying a competitor access to a network joint venture.

Because the issues presented by this case are of exceptional importance to *amici* and their members, and because *amici*'s interests coincide with the goal and purpose of antitrust law, which is to promote consumer welfare through low prices and increased innovation, *amici* respectfully seek leave of this Court to file the attached brief in support of the petition for writ of certiorari.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

As detailed in the motion accompanying this brief, this case is of great interest to *amici*, as consumer advocacy organizations, because the decision of the United States Court of Appeals for the Tenth Circuit in *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) poses a serious threat to consumers. *Amici* wish to focus this Court's attention in particular on a fundamental flaw underlying the Tenth Circuit's economic and antitrust analysis: the erroneous notion that, with 6,000 competitors already in the Visa joint venture and competing with each other on price, one more can't "make a difference." In fact, substantial competitive injury to consumers can--and in this case

will--result from collective action denying a competitor access to a network joint venture.

FACTUAL BACKGROUND

Visa USA Inc. is a network joint venture of banks and other financial institutions that issue Visa credit cards to consumers. Collectively, the members of Visa (almost all of whom also offer MasterCard) account for more than 70 percent of the general purpose credit card market.

The competitive strategy of Visa's largest member, Citicorp, has long been to issue *both* association credit cards (Visa and MasterCard) *and* proprietary credit cards (Diners Club and Carte Blanche). In the early 1980s, Sears[1] decided to follow the same competitive strategy. It began by introducing Discover Card in 1985. As a new and aggressive market participant, Discover Card brought several important features to the marketplace: cardholder pre-approval, no annual fee, cash-back bonuses at year end and deep merchant discounts--all on a nationwide basis.

Following the successful introduction of Discover Card, Sears sought to implement the second part of its two-pronged, Citicorp-like strategy by applying for membership in the Visa joint venture. In response, Visa's board adopted Bylaw 2.06, which provides that, "if permitted by applicable law, [Visa] shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors. . . ."[2]

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[1]At the time, Sears was the parent of what is now Dean Witter, Discover & Co. ("Dean Witter"). Petitioner, MountainWest Financial Corporation, is a wholly owned subsidiary of Dean Witter.

[2]Subsequently, Visa's board also adopted Bylaw 2.10(e), which formally established that an *existing* member of the joint venture

At trial, Visa sought to explain and justify its Bylaw 2.06 with a series of rationales--prevent free riding, increase intersystem competition, etc.--that the jury found transparent and, to put it politely, insincere. More straightforward and revealing--and convincing to the jury--was the concession by Citicorp's representative on the Visa board that, in fact, he voted in favor of the adoption of the exclusionary bylaw because "Discover card was a very effective price competitor," and he "did not want to encourage that kind of price competition within Visa."

SUMMARY OF ARGUMENT

In a decision that "surprised most people in the [credit] card industry,"[3] the Tenth Circuit gave short shrift to the jury's and district court's painstaking examination of the evidence with respect to Visa Bylaw 2.06 and its competitive effects, and instead determined that Visa's bylaw is, as a matter of law, a reasonable restraint. This Court should grant the writ of certiorari in order to resolve the present conflict and confusion among the circuits on the critically important issues of widespread importance raised by this case. In doing so, the Court should reaffirm that concerted action by competitors against a rival--particularly a maverick that, absent the concerted action, would bring increased competition to the marketplace--can constitute a violation of Section 1 of the Sherman Act.

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would likewise not be allowed to issue proprietary cards "deemed competitive" with Visa association cards. In spite of Bylaws 2.06 and 2.10(e), Visa's board has never taken action to prohibit Citicorp--not only its largest member, but the only one at the time of trial with a permanent seat on Visa's board of directors--from continuing to issue its rival Diners Club and Carte Blanche cards.

[3]Knecht, *Dean Witter Loses Court Bid to Enter Its Discover Card in the Visa Network*, Wall St. Journal, Sept. 26, 1994 at A5.

ARGUMENT

One of Visa's linchpin arguments is that, because there are 6,000 competing card issuers in the Visa network, competition cannot be harmed by exclusion of one competitor. As Visa put it in its brief to the Tenth Circuit, "with 6,000 VISA and MasterCard issuers, almost entirely open entry, and no restrictions on output or price competition, what difference does it make?" Brief for Appellant at 55. *SCFC ILC, Inc. v. VISA USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) (No. 93-4105) ("*SCFC I*").[4] Similarly, the district court summarized Visa's argument as follows: that, because "[c]ompetition among the 6000 [Visa] members is said to be vigorous, . . . the exclusion of one additional competitor cannot harm competition." *SCFC ILC, Inc. v. VISA USA, Inc.*, 819 F. Supp. 956, 971 (D. Utah 1993) ("*SCFC II*"). While the district court rejected this argument, the Tenth Circuit's opinion tacitly--and erroneously--endorses it. *Compare SCFC II*, 819 F.Supp. at 971-72 *with SCFC I*, 36 F.3d at 960, 967. However, as this Court, other courts and leading commentators have recognized, even where there are many competitors in a joint venture and each remains free to set its own prices, competition and consumers are harmed when venture members join together to impair the effectiveness of a competitor--especially an aggressive, maverick competitor that, absent the concerted action, would bring lower prices, more innovation and greater choice to consumers.

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[4] *See also* Brief for Appellant at 35 ("there are thousands of VISA issuers"); 43 ("VISA has 6,000 issuers"); 47 ("with 6,000 issuers . . . who compete with each other on price and other terms, and with no output restrictions, how does Bylaw 2.06 give VISA any power to restrict output or raise prices?"); and 50 ("VISA's 6,000 card-issuing members are free to, and do, compete with one another").

A. The exclusion of one rival from a network joint venture *can* and--and in this case *will*--harm competition.

This Court has long recognized the danger of collective action by competitors against a rival, even where the excluding competitors compete vigorously against each other and the excluded party remains a viable competitor. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982), for instance, the Court was presented with an association of *90,000 members* whose actions were aimed at the competitive efforts of a single firm. Rejecting the fallacy that one additional competitor could add little to such an "atomistic" market,[5] this Court affirmed the jury's Section 1 verdict for the plaintiff. The Court emphasized that the actions of existing members to manipulate association standards to protect themselves from a particularly potent competitor who wished to introduce a new product "dramatically illustrate" the power of the members--when acting collectively--to restrain competition even in the absence of price fixing. *Id.* at 571.

A similar result obtained in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1974), where a labor union attempted to insulate 75 or more union contractors from competition with nonunion contractors. Even though there remained unfettered competition among the union contractors, the Court was concerned about exclusion of nonunion contractors who might be more efficient and noted that "competition based on efficiency is a positive value that the antitrust laws strive to protect." *Id.* at 623. As the Court explained: "Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the

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[5] *Compare with SCFC II*, 36 F.3d at 967 (the credit card issuer market "remains atomistic").

business market has substantial anticompetitive effects, both actual and potential . . . ." *Id.* at 625.[6]

The sound reasons for condemning exclusion of a single competitor, even where there are already a large number of firms and they are competing vigorously, has been explained by Professor Areeda:

> Imagine that 100 producers of something compete perfectly with each other, with both output and prices at the competitive level. Suppose that they somehow gang up to prevent a 101st firm from entering their market. If output and even price are the only concerns of antitrust law, should it ignore this boycott . . . ?
>
> . . .
>
> The hypothetical boycott should be condemned by antitrust law for three overlapping reasons. First, the 100 firms would be acting irrationally to devote any resources to excluding the 101st firm from the market, unless they believed it helped their profits to do so. That is, they must be assuming that there would be a price output effect . . . Given that certain proof of anything is both

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[6]*See also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (affirming jury verdict that joint activity of competitors to exclude a rival from product certification violated Section 1 even absent of price-fixing); *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (striking down provision preventing league members from investing in teams of a rival sports league); *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) (affirming jury's Section 1 verdict against exclusion of hospital from the Blue Cross network when hospital was acquired by a rival network).

> difficult and socially costly, it is both convenient and sensible to assume that business people are acting in their own self-interest and to assume that an unambiguously exclusionary purpose tends to indicate an anticompetitive effect. Second, as a general proposition, entry opportunities free of private restraint are critical to the achievement of economic efficiency. Third, when a challenged restraint is of a type that generally impairs competition and no offsetting redeeming values are offered, it is prudent for antitrust law to condemn it without burdening the legal system with having to prove a detrimental power or effect. The strong fairness claims of allowing access to markets is entirely congruent with economic efficiency and not opposed to it.

Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L. J. 523, 536-37 (1983).

As Professor Areeda's analysis confirms, even if a large number of competitors are competing "perfectly" with each other, their concerted exclusion of another competitor can run afoul of Section 1. Plainly, "collusive behavior is not limited to prices, market division, and boycotts. Competitors may employ horizontal agreements to raise their rivals' costs by disadvantaging firms outside the agreement or preventing innovative practices by nonparticipating firms." Langenfeld, *Anticompetitive Agreements Among Competitors*, 709 PLI/Corp. 89, PLI Order No. B4-6944 (Oct. 1990). *See also* Carlton & Salop, *You Keep Knocking But You Can't Come In: Evaluating Restrictions on Access to Joint Ventures*, Working Paper No. 111, Center for the Study of the Economy and the State, the University of Chicago (April 1995) (detailing how joint venture access rules of the type instituted by Visa can reduce competition by raising the excluded firm's costs).

B. Competive injury to consumers is magnified when--as here--the excluded rival is an industry maverick that would otherwise introduce particularly vigorous competition.

The competitive injury caused by competitors acting in concert to exclude an industry maverick from a network joint venture can be particularly pronounced. A maverick firm is an innovative and aggressive challenger who typically brings consumers more choices and lower prices.[7] The idea that "a single competitor in a market with many actual or potential competitors is unlikely to generate much competitive pressure," is "not always accurate, as it ignores the importance of a firm's individual business strategy in determining its competitive significance." Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1070-71 (1991). As Professor Gerla explains:

> Firms following unusual business strategies tend to be market disrupters, destroying "gentlemanly competition" and generating competitive pressure vastly out of proportion to their size. The disruptive business strategy can assume a variety of forms. For example, the disruptive firm could generate a great deal of competitive pressure by acting as a price cutter, by introducing innovative products and processes, or by utilizing different methods of distribution. Thus, in order to gauge the competitive significance of a particular firm, the finder of fact must examine both market structure *and the*

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[7] *See* Fox, *The Future of the Per Se Rule: Two Visions at War with One Another*, 29 WASHBURN L. J. 200, 210 (1990) (referring to such firms as "robust agents of competition").

> *particular competitive strategy employed by that firm.* (emphasis added) (footnotes omitted) *Id.* at 1071-72.[8]

This view is shared by both federal antitrust enforcement agencies, whose *Horizontal Merger Guidelines* recognize the important impact a maverick firm can have on competition. The *Guidelines*, which are applicable to proposed joint ventures, indicate that the federal enforcement agencies may challenge otherwise allowable horizontal joint ventures or mergers--even when the firms have low market shares and the industry is not concentrated--where the effect of the joint venture or merger is to stifle a "maverick" competitor who is an "unusually disruptive and competitive influence in the market." U.S. Department of Justice & Federal Trade Commission, § 2.12 *Horizontal Merger Guidelines* (1992).[9]

The record in this case demonstrates that Dean Witter is the industry maverick, and that its approach to marketing Visa cards would

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[8]The jury that heard this case--and later, the district court--made precisely such an examination of "market structure and the particular competitive strateg[ies]" present in the general purpose credit card market in which Dean Witter and the Visa network operate. *See generally SCFC I*, 819 F.Supp. at 961-66.

[9]Previous versions of the agencies' merger guidelines contain similar statements. *See* U.S. Department of Justice, § III(C)(2)(c) *Merger Guidelines* (1982); Federal Trade Commission, § 3(A)2 *Statement Concerning Horizontal Mergers* (June 14, 1982); U.S. Department of Justice, § I(8) *Merger Guidelines* (1968). *See also United States v. Aluminum Co. of America*, 377 U.S. 271 (1964) (acquisition of innovative firm that "disrupted" market may cause serious injury to competition). While enforcement policies have changed substantially in the last 30 years, one thing has remained constant--a recognition that the unrestrained presence of a maverick can bring substantial procompetitive benefits to the market.

benefit consumers. Thus, Dean Witter's proposed Prime Option Visa was designed, among other things, to incorporate lower interest rates, be offered at no annual fee, contain a periodic skip-a-payment feature and offer a relatively high initial credit line. Equally important, its proposed *nationwide* offering of Visa Prime Option would bring the benefits of increased output to all American consumers, not just those in small local or regional areas where the vast majority of Visa members market and offer Visa cards. Consumers will suffer if Visa is allowed to exclude Dean Witter's "disruptive and competitive influence" from the otherwise "gentlemanly competition" of the Visa network. Such an exclusion would also kill any prospect that consumers might benefit from the competition that would be provided by the entry of additional proprietary cards into a market that has witnessed the entry of not a single proprietary credit card issuer since Visa's adoption of Bylaw 2.06.

In sum, even in the absence of price fixing or explicit output restrictions, the exclusion of Dean Witter from the Visa network joint venture through use of Bylaw 2.06 allows Visa members--who possess substantial market power when acting collectively--to harm competition. Consumers should be able to enjoy the added competition in the general purpose credit card market that would be realized if the jury's finding that Visa's exclusionary bylaw is anticompetitive is allowed to stand, as it should be under well-settled legal and economic principles.

CONCLUSION

For the foregoing reasons, *amici curiae* request this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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